INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	2
Argument	12
Conclusion	14

CITATIONS

Cases:

Excelsior Underwear, Inc., 196 NLRB 1236	7
International Union, United A., A., & A. Imp. Wkrs. v. *National Labor Relations Board*, 392 F.2d 801, certiorari denied, sub nom. *Preston Products Co., Inc.* v. *National Labor Relations*, 392 U.S. 906	13
National Labor Relations Board v. *Auto Ventshade, Inc.*, 276 F. 2d 303	8
National Labor Relations Board v. *Gissel Packing Co.*, 395 U.S. 575	11
National Labor Relations Board v. *Wyman-Gordon Co.*, 394 U.S. 759	7
J. P. Stevens & Co., 190 NLRB No. 139, 77 LRRM 1333, pending on petition to review, *sub nom. Textile Workers Union* v. *National Labor Relations Board*	13
United States v. *Yellow Cab Co.*, 338 U.S. 338	13

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-264

J. P. STEVENS & CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is not yet officially reported. The Board's decision and order (Pet. App. 35a-38a, A29-161)[1] are reported at 179 NLRB No. 47.

[1] The opinion of the Trial Examiner is not reproduced in the appendix to the petition, but is included in the appendix to the briefs in the court below, which is cited herein as "A." "Ex." refers to the volume of exhibits and "S.A." to the Board's supplemental appendix in the court below.

JURISDICTION

The judgment of the court of appeals (Pet. App. 33a-34a) was entered on April 13, 1971. The petition for a writ of certiorari was filed on June 11, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the National Labor Relations Board properly concluded that the union had obtained valid authorization cards from a majority of the employees, and that the employer should recognize and bargain with the union on the basis of those cards.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 163, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at pp. 2-3 of the petition.

STATEMENT

The Board found that in February and March, 1968, the Company violated Section 8(a)(1) of the Act by threats, promises of benefit, unlawful interrogation, and an unlawfully broad, discriminatory no-solicitation rule, during the Textile Workers Union's election campaign at the Company's Statesboro, Georgia plant (Pet. App. 36a; A. 49-52). The Board further found that the Company violated Section 8(a)(3) by discharging three union adherents and refus-

ing to hire the relative of union adherents (Pet. App. 36a, n. 2; A. 52-73).

In upholding these findings—which are not disputed by the Company here—the court of appeals characterized the Company's anti-union drive as

> an extensive campaign of 'classic, albeit crude, unlawful labor practices' to defeat the Union * * * Supervisory personnel threatened that a Union victory would result in a reduction of work, extensive discharges, and even the closing of the plant. * * * Company officials engaged in blatant surveillance of Union activities. * * * Stevens' supervisors interrogated employees with regard to Union activities under circumstances that tended to be coercive and intimidating * * * and made promises of benefits calculated to undermine Union strength * * *. During a critical juncture in the Union campaign the Company granted certain benefits which * * * were designed to destroy Union support. * * * Finally, when the Union organizing effort began, the Company breathed new life into a long dormant rule prohibiting all solicitation at the plant, even on non-working time. [Pet. App. 6a-7a, citations omitted.]

The petition challenges the propriety of the Board's further findings, sustained by the court below, that the Union had obtained valid authorization cards from a majority of the employees during the campaign, and that the Company's extensive unfair labor practices made a fair election impossible and thus required a bargaining order. The facts relevant to this issue are as follows:

1. On January 24, 1968, Union organizers Riffe and Best stationed themselves on the access road outside the plant and distributed leaflets to employees as they entered and left (A. 79, 292-294, 305-307; Ex. 104). The leaflet enumerated the advantages of union organization, and urged employees to fill out and mail back to the Union the authorization card which appeared on one corner of the leaflet.[2] Approximately

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[2] The card read as follows (A. 77-78; Ex. 104):

TEXTILE WORKERS UNION OF AMERICA
AFFILIATE OF THE AFL-CIO AND CLC

I hereby join with my fellow workers at the ..... mill in organizing a union in order to better our conditions of life and secure economic justice, as is my right under the laws of the United States. To this end I declare that the Textile Workers Union of America, AFL-CIO and CLC, shall be my representative in collective bargaining over wages, hours and all other conditions of employment. I make this pledge of my own free will in the conviction that the united action of all workers through unions of their own choosing is the way to achieve the liberty of the individual for the benefit of all.

In addition, the card had a place for the employee's signature, the date, job description information, and the employee's address.

A second type of authorization card distributed by the Union read as follows:

TEXTILE WORKERS UNION OF AMERICA
AFFILIATE OF THE AFL-CIO AND CLC

I hereby accept membership in the Textile Workers Union of America of my own free will and do hereby designate said Textile Workers Union of America as my representative for the purposes of collective bargaining in

70 of the cards distributed on January 24 were mailed back to the Union (A. 80; 294). On February 8, the Union organizers stationed themselves outside the plant and distributed another pamphlet which also had an authorization card attached. Approximately 30 of these cards were mailed back to the Union (A. 80; 295).

On both occasions, the organizers had little or no time to engage in discussions with employees as they drove by in their automobiles. In substance, they merely said that, if the employee wanted a union, he should sign the card on the leaflet and mail it back to the Union. At no time did the organizers mention an election. (A. 80; 295, 307, 311.)

After the second distribution of leaflets, Chief Union Representative McIver mailed a letter, which announced an organizational meeting on February 12, to all employees who had signed cards (A. 80; 296, Ex. 107). At this meeting, McIver told the employees who attended that, as soon as the Union received authorization cards from a majority of employees, the Union would demand that the Company recognize and bargain with it and would offer to prove its majority before an impartial third party. McIver predicted, however, that the Company would not recognize the Union and that thus "probably we would have to have an election, but only if J. P. Stevens and Co. would not recognize us." He also stated that the Labor Board

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respect to rates of pay, wages, hours of employment or other conditions of employment.

This card also had spaces for the employee's signature, job description, date, and employee's address (A. 78-79; see *e.g.*, Ex. 127).

would hold an election if 30 per cent of the employees signed authorization cards and emphasized that "we were not down here just to hold an election, we were down here to get the Union in, that it wouldn't serve any purpose just to come down and hold an election." (A. 81; 297-298.) McIver distributed copies of an organizing committee sheet, and read the four lines which appeared at the top to the employees.[3] During the organizing campaign, approximately 153 employees signed these sheets (A. 82; 300-301).

At the meeting on February 15, McIver was questioned about Plant Manager Bachman's statement that employees' authorization cards would be put upon the table for him to see. McIver answered that "the only time that would happen * * * was when the majority of the employees signed up in the Union and the Company later illegally destroyed that majority * * *" (A. 82; 303). McIver told the approximately 120 employees in attendance that signing the union card "was definitely proving they was for the union" (A. 82; 298, 303).[4]

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[3] These were:

> I hereby authorize the Textile Workers Union of America, AFL-CIO, to use my name for the purpose of organizing Gulistan Plant—J.P. Stevens & Co., Inc. This will include sending my name to the National Labor Relations Board as a Voluntary Organizer. Also to be used in the signing of Union leaflets. [A. 81, 300; Ex. 136, 138.]

[4] At neither the February 12 nor the February 15 meetings did McIver or Union Representatives Riffe or Best state that the *only* purpose of the cards was to get an election (A. 82; 298, 307, 308, 310, 392-393, 394-395, 396, 434, 438-439, 440, 317-318, 328, 329, 352-353).

2. On February 17, the Union wrote the Company a letter in which it claimed to represent a majority of the production and maintenance employees; demanded recognition as the exclusive representative of those employees; and added that, if the Company had any doubt of its majority status, the Union would submit the authorization cards in its possession to a disinterested third party who could check the signatures thereon with those on the Company's payroll records (A. 75-76; Ex. 108). The Company replied that it had reason to believe that a majority of the employees did not want union representation; that it did not wish a third party to check cards; and that it assumed the Union would refer the matter to the Board for its disposition (A. 76; Ex. 110).

The Union filed an election petition with the Board on February 21, which scheduled an election for April 22-23. At the representation hearing held on March 18, Union Representative Horn told the Company's counsel that the Union had a substantial majority among the employees in the unit and that its previous demand for recognition was a continuing one (A. 76; Ex. 133).

The Union lost the election, 198 to 110, and thereafter filed objections based on the Company's unfair labor practices and its failure to provide the Union with a list of the employees' names and addresses in conformity with the Board's *Excelsior* requirement (Ex. 119-120).[5] The Board's Regional Director, not-

[5] See *Excelsior Underwear, Inc.*, 196 NLRB 1236; *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759.

ing that "it is unnecessary to consider the [Union's] remaining objections," set the election aside and directed a second election because of the Company's failure to submit the *Excelsior* list (Ex. 121-124). The Union subsequently filed unfair labor practice charges against the Company, including a charge alleging that it had unlawfully refused to bargain. A complaint issued on these charges.[6]

3. In the unfair labor practice proceeding, the Board's Trial Examiner found that 224 out of 343 employees had signed authorization cards by March 18, when the Union renewed its bargaining demand (A. 77-79, 135-136). The Company challenged the cards of 92 employees on the ground that they had been secured by the misrepresentation that they would be used only to obtain an election. The Examiner declined to count 7 of these cards, which he found were signed after March 18 (A. 136-139). The Examiner rejected the Company's challenge to the remaining 85.

The Examiner found that 19 cards[7] were obtained

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[6] These charges "blocked" a second election under the Board's policy of not conducting, in the absence of special circumstances not present here, a representation election during the pendency of meritorious unfair labor practice charges. See *National Labor Relations Board* v. *Auto Ventshade, Inc.*, 276 F. 2d 303, 307-308 (C.A. 5).

[7] George Bland (A. 88; 414); Don Hughes (A. 96-97; 442-443); Jimmy C. Miley (A. 113-114; 448); Cliff Rucker (A. 113-114; 517); Fred Bazemore (A. 87; 507-508); Linda M. Bolton (A. 114; 415); Winard O. Burke (A. 114; 429-430); Jerry Collings (A. 114; 534); Glenda Davis (A. 92; 527-528); Henry Davis (A. 93; 504-505); Veronica Keel (A. 114; 424-425); Rosa L. Lewis (A. 114; 423); Carolyn Lovett (A. 114; 437); John C. Mills (A. 114; 349); Wayne Moore (A. 102-

at the Union meetings of February 12 and 15, and he credited the Union organizers' testimony that the employees were told at those meetings that the cards could form the basis of a bargaining request. Nine cards [8] had been solicited at the access road. The Examiner also credited the organizers' testimony that they did not mention an election while handing out the leaflets there. The Examiner rejected the testimony of 14 employees [9] that organizers Riffe or McIver had misrepresented the purpose of the cards on other occasions during the campaign; nor did he credit the testimony of 21 employees [10] who testified

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103; 441); James Pounds (A. 114; 454); Argentine Raymond (A. 114; 418); Woody Royal (A. 105; 538); Sammy Strouse (A. 107; 455-456).

[8] Ronald D. Bowen (A. 88-89; 324); Dollie Dyches (A. 111; 353); Jesse D. Glisson (A. 111; 358-360); Bernard T. Hendrix (A. 111; 350); Bobby Key (A. 110-111; 365-367); Council Taylor Lee (A. 110; 327); Lester Parker (A. 111; 398-399); Jerry Potter (A. 104; 362-363); Walter Smith (A. 110; 377-378).

[9] Alva Lee Anderson (A. 126; 474-475); Jack Bragg (A. 115; 433); Gene T. Dixon (A. 126; 498); James A. Lanier (A. 126; 443); Dewitt Love, Jr. (A. 126; 401); Marian McGrady (A. 126; 477); Emma McKeehan (A. 126; 492); Thomas Mock (A. 126; 496); Doris Peacock (A. 126; 464); Sallie Ward (A. 125; 487-488); Hazel Brown (A. 129; 525); J. W. Mock (A. 128-129; 501); Geneva Stephens (A. 129; 473); Johnnie Peace Tremble (A. 129; 480).

[10] Jessie Robert Bazemore (A. 87; 326); Mary B. Bolton (A. 116; 417); Daniel Dyches (A. 131-132; 509-510); Larry Finch (A. 116; 485); Thomas G. Hendrix (A. 130; see p. 2772 of the original transcript); Glenda M. Holloway (A. 130; 500); John P. Ivey (A. 130; 481); Malcolm Mock (A. 116; 483); Jimmie Reddick (A. 130; 532); Willie D. Robinson (A. 104-105; 386-387); John H. Sampson (A. 130; 403); Charles

that employee union adherents had misrepresented the purpose of the cards.

The Examiner accepted as valid the cards of 13 employees who merely testified that they did not read the card or did not understand it; [11] that they were told the card would never be shown to the Company [12] or that it was needed for an election; [13] or that they signed with the understanding that an election was the card's purpose.[14] Finally, he accepted as valid the cards of seven employees [15] who claimed that they were

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Stewart (A. 116; 506); Walter V. Street (A. 116; S.A. 9); J.C. Marsh (A. 100-101; 387-388; S.A. 7); Mildred Bailey (A. 115-116, 496-497; S.A. 14); Sue Jones (A. 98; 529-531); Ruth J. Kendrick (A. 115; 493-494); Ida Ann McGahee (A. 125; 461, 445); Thomas Davis (A. 109; 406); Donald Brannen (A. 132-133, 421-422; Ex. 182; S.A. 7); Regis Wise (A. 109; 409-410).

[11] Jack Bazemore (A. 84; 426-428); Rosa Byrd (A. 124; 536); William Hodges (A. 85; 332); William H. McMillan (A. 86; 436); Bernie Lee Robinson (A. 86; 331-332).

[12] Gladys Dyches (A. 85; 335-338); William H. McMillan (A. 86; 436).

[13] Rosa Byrd (A. 124; 536); Ralph Evans (A. 94; 440); Dell Hendley (A. 85; 491); Harold McCray (A. 86, 94; 435, S.A. 8); Hugh Strickland (A. 124; 413).

[14] Howell Berry (A. 124; 345-357, 407-408); J.C. Brown (A. 124-125; 345-346); Gladys Dyches (A. 85; 355-356); William H. McMillan (A. 86; 435); Gordon Mincey (A. 124; 471-472, S.A. 12).

[15] Otha Smith (A. 106-107; 369-372); Jerry Woodcock (A. 109; 457-459); James Jones (A. 97-98; 361-362); Ozell Lawrence (A. 98-99; 378-381); Fred Wiley (A. 108; 373-376); Ike McNeely (A. 100; 339-340); Hubert J. Miller (A. 102; S.A. 6).

told that the purpose of cards was only to secure an election *after* they had signed them, and cards of two employees [16] who, he found, were well aware of the purpose of the card and thus could not have relied on the statements they attributed to the organizers.

4. The Board sustained the Examiner's finding that the Union had valid authorization cards from a majority of the employees (Pet. App. 36a). Applying the principles enunciated in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, it further concluded that the Company's "extensive and egregious unfair labor practices" had dissipated "the majority which the Union acquired between February 18 and March 18, 1968," and that a bargaining order was "required to repair the effects of such unfair labor practices" (Pet. App. 37a, n. 3). The court of appeals held that the Board's findings and conclusions were amply supported by the record, and that a bargaining order was clearly appropriate under *Gissel* (Pet. App. 1a-32a).[17]

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[16] Ruth Durden (A. 93; S.A. 9-11); Gerald McMillen (A. 99-100; 367-368).

[17] The court also ruled that a bargaining order would be appropriate even in "the absence at one point of a Union-demonstrated majority" because of the "outrageous" nature of petitioner's unfair labor practices. We believe the Court need not consider this alternative ground of the court of appeals' ruling because that court was clearly correct in affirming the Board's conclusion that the union had, at one point, obtained a legitimate majority.

ARGUMENT

Petitioner's principal contention (Pet. 12-22) is that the Board erred in counting the cards of the 92 employees [19] who, it asserts, signed pursuant to the misrepresentation that the cards would be used solely for purposes of an election. This purely factual issue was correctly resolved against petitioner by the Examiner, whose findings were affirmed by the Board and the court of appeals. Further review by this Court is not warranted.

The Examiner did not, as petitioner contends (Pet. 26-27, n. 1), simply credit the Board's witnesses while rejecting wholesale the testimony of the Company witnesses.[20] He heard and viewed the witnesses and carefully evaluated each of the questioned cards in accord with the principle which this Court approved in *Gissel*: "[E]mployees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to disregard and forget the language above his signature"; "[t]here is nothing in-

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[19] As noted, *supra*, p. 8, the Board only counted 85 of these cards.

[20] Petitioner cites (Pet. 13-15) the testimony of 10 "representative" witnesses. Apart from the fact that the Examiner discredited all of these witnesses, two—Bradd (A. 524) and Griner (A. 521)—signed after March 18 (A. 136-138); four—Thomas Mock (A. 496-497), John Ivey (A. 480-481), Doris Peacock (A. 465-466), and Jessie Mock (A. 500-503)—signed after the Union's election petition had been filed (A. 126-127, 128-129, 130, 131); one—Freddie Wiley (A. 373-376)—signed the card before the alleged misrepresentation was made (A. 108).

consistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election." 395 U.S. at 606-607. The credited testimony does not show that the Union solicitors in this case exceeded these limits. See also *id.* at 584, n. 5.[21] The fact that the Examiner credited the testimony of one side's witnesses and rejected that of the other side's witnesses does not prove that he improperly evaluated the evidence. See *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 340-341.

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[21] The fact that 117 employees intervened on behalf of the Company does not militate against a bargaining order here, as the court of appeals correctly held (Pet. App. 21a-26a). Several of the employees were active union adherents during the campaign (A. 450-451, 324). As the court held (Pet. App. 22a), the Board properly concluded that their "recantation was simply a product of Stevens' unlawful conduct." Cf. *International Union, United A., A., & A. Imp. Wkrs.* v. *National Labor Relations Board*, 392 F. 2d 801, 808-809 (C.A. D.C.), certiorari denied, *sub nom. Preston Products Co., Inc.* v. *National Labor Relations Board*, 392 U.S. 906. The Board has recently held that the Company unlawfully withheld overtime and wage increases from two employees who testified for the Board in the instant case. *J.P. Stevens & Co.*, 190 NLRB No. 109, 77 LRRM 1333, pending on petition to review, *sub nom. Textile Workers Union* v. *National Labor Relations Board*, C.A. D.C.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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